INDEX

CITATIONS

Cases:

Cases—Continued

Statutes:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 224

CIVIL AERONAUTICS BOARD, PETITIONER

v.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES; THE UNITED STATES OF AMERICA ON BEHALF OF THE POSTMASTER GENERAL; AND WESTERN AIR LINES, INC.

No. 225

WESTERN AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES, AND THE UNITED STATES OF AMERICA, ON BEHALF OF THE POSTMASTER GENERAL

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 341) is not yet re-

ported. The orders and findings of the Civil Aeronautics Board (R. 183, 258, 333) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 1953 (R. 354). The petitions for writs of certiorari were filed on July 31, 1953, and were granted on October 12, 1953 (R. 357). The jurisdiction of this Court rests on 28 U.S.C. 1254.

QUESTIONS PRESENTED

Under Section 406 of the Civil Aeronautics Act, the Civil Aeronautics Board is empowered to fix "fair and reasonable" mail rates at a level which, together with the carrier's "other revenue", will enable the carrier "to maintain and continue the development of air transportation to the extent and of the character required for the commerce of the United States, the Postal Service, and the national defense." The questions presented are:

1. Whether non-transportation revenues derived from activities incidental and related to the air carrier operations for which a mail rate is being fixed constitute "other revenue" which may be applied to reduce the rate.

2. Whether, after having approved the purchase price to be paid by an air carrier for one of the air routes of another as being in the public interest because the profit to the selling carrier would provide the incentive for the sale, the Board, in fixing a mail rate for the selling carrier, was required by Section 406 to reduce, by the amount

of profit attributable to the sale of the route, the mail pay allowance otherwise "fair and reasonable."

3. Whether the provisions of Section 406 preclude the Board from declining, as a matter of regulatory policy and for the purpose of encouraging voluntary route transfers deemed necessary in the public interest, to reduce mail rates otherwise "fair and reasonable" by the amount of profits derived from route sales.

STATUTE INVOLVED

The pertinent provisions of the Civil Aeronautics Act, which will be referred to as the Act, are set forth in the Appendix, *infra,* pp. 29 to 31.

STATEMENT

These cases arise out of a proceeding before the Civil Aeronautics Board in which a final air mail rate was fixed for a past period for Western Air Lines, Inc. Both the Postmaster General and Western were parties to the Board's proceeding, and both sought review of the Board's order. The petitions for review were consolidated for hearing and decison by the Court of Appeals (R. 355), and a single opinion and judgment were entered (R. 341, 354). The Court of Appeals affirmed the Board's order insofar as it was challenged by Western (Case No. 11324 below), and reversed the order in part upon the basis of the challenge made by the Postmaster General (Case No. 11259 below). This brief is in support of the decision

below insofar as it rejected the contentions of invalidity in the Board's order urged by Western (Case No. 225 in this Court), and also in support of the Board's contention that the Court of Appeals erred in partially reversing the order (Case No. 224 in this Court).[1]

The period involved was May 1, 1944 through December 31, 1948, and operations during this period had been conducted by Western under temporary rate orders.[2] In 1947, during the open-rate period, Western had entered into a contract with United Air Lines for the sale, at a profit in excess

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[1] These cases have been consolidated for hearing with *Civil Aeronautics Board* v. *Summerfield, et al.*, No. 222, and *Delta Air Lines* v. *Summerfield, et al.*, No. 223, which involve related issues concerning the Board's powers under the mail rate provisions of the Civil Aeronautics Act. The Board has filed a separate brief in Case No. 222.

[2] Prior to April, 1944, Western was conducting operations under a final service or non-subsidy rate of 60 cents per mail ton-mile for mail actually transported. In that month, the carrier petitioned the Board (R. 15) for the fixing of a need rate to be made effective from May 1, 1944, thereby in effect converting the final service rate into a temporary rate since the Board may make its new rate orders effective retroactive to the date of the institution of the rate proceeding. *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board*, 336 U. S. 601. Payments continued under the 60 cent rate order until April 29, 1947, when the Board entered a new order temporarily providing a higher rate (R. 44). On December 30, 1948, the Board issued a statement of tentative findings and conclusions proposing a lump sum need payment as final mail compensation for the past period May 1, 1944-December 31, 1948, and a need rate for the future (R. 54). The proposed lump sum payment for the past period was then made effective on a temporary basis at Western's request (R. 126, 127), pending determination of the exact amount to be paid, and the proceeding to determine this precise amount was severed from the proceeding to fix the future rate (R. 135). Only the rate or lump sum payment for the past period is here involved.

of $1,000,000, of Western's certificate and properties for air operations between Los Angeles and Denver (Route 68). After imposing appropriate conditions to insure that the portion of the purchase price paid by United in excess of the depreciated value of the physical assets would not be recouped by United from either the public or the Government, the Board approved the sale. *United-Western, Acquisition of Air Carrier Property*, 8 C.A.B. 298 (1947). As stated by the Court of Appeals (R. 343):

> The Board decided that the transfer of the route at the amount to be paid by United was in the public interest, because the profit on the transaction would provide the necessary incentive for Western to make a sale and the purchasing carrier could operate the property to greater advantage to the public. The Board acted upon the premise that it has no power to force a carrier against its will to transfer property to another carrier; its only power to influence such transfers is the power of inducement. It decided that a profit on a sale would be such an inducement. Hence it approved the sale.

Section 406(b) of the Civil Aeronautics Act (*infra*, p. 31) provides in part that, in fixing "fair and reasonable" mail rates, the Board "shall take into consideration, among other factors," the "need" of the carrier for mail compensation, which, "together with all other revenue of the air carrier," will enable the carrier to "maintain and

continue the development of air transportation . . .". Western contended that the profits derived from the sale of the route and air carrier properties could not be considered by the Board in determining the mail pay allowance. It asserted that the only "other revenue" which could be taken into account was revenue derived from the sale of air transportation, or tariff revenue. The Board determined that these profits could be used to reduce the mail pay allowance (R. 261). It stated, however (R. 262):

> While we are required by the Act to "take into consideration" the "need" of the carrier for mail compensation together with "all other revenue," we do not understand the language of section 406(b) as requiring us to reduce the carrier's mail pay need with any part of such "other revenue." This is a matter within our discretion. That is, we may take in "other revenue" in whole, in part, or not at all. However, we will normally use "other revenue" as available to reduce need unless there are exceptional and compelling circumstances which dictate otherwise.

The Board had first determined to reduce the mail pay allowance by the entire profits from the transaction (R. 200). On reconsideration, the Board found that there were exceptional and compelling circumstances which required that the carrier be permitted to retain a part of these profits. In making this determination, the Board found (R. 263) that any other course of action would,

in effect, override the considerations which had prompted the Board's opinion and action in previously approving the sale at a profit, and would destroy the profit incentive for need carriers to effectuate route transfers necessary for the improvement of the air route pattern. The Board reduced the mail compensation by the profit derived from the sale of tangible assets, aircraft and the like, fixed at $652,000 (R. 264, 279). It declined to reduce the mail pay allowance by the profit realized from the sale of the "intangible value" of the route. Western was permitted to keep this amount, fixed at $447,000 (R. 279), because the profit on the sale of the earning power of the route was the "factor which played the decisive part in the route transfer" (R. 264). The Board concluded (R. 265)

> * * * it should again be emphasized that our decision not to include the net profit from the sale of the intangibles was reached solely because we are thus seeking to encourage improvement of the air route pattern through voluntary route transfers by other air carriers.

Western also had realized some $88,000 in profits during the period from the operation of restaurants and other concessions, including slot machines, at airport terminals used by the carrier in connection with its operations at Salt Lake City, Las Vegas and Long Beach. These revenues also were determined by the Board, again over Western's protest, to be "other revenue" available to reduce mail pay,

and the mail pay was further reduced by these incidental revenues (R. 191-195).[3]

The Court of Appeals (Prettyman, Proctor and Bazelon, JJ.) affirmed, against Western's challenge, the Board's determination that the revenues from the airport concessions, the profit from the sale of the intangible value of Route 68, and the profit from the sale of the tangible or operating properties accompanying the route all constituted "other revenue" to Western which could be used to reduce the mail pay allowance (R. 348, 351). The Court also held, in response to the Postmaster General's petition, that the Board was required to further reduce the carrier's mail pay by the $447,000 profit from the sale of the intangibles (R. 350).

In holding this further reduction to be required, the Court stated (R. 344) that "[t]he statute says that the carrier should receive the amount needed not only to insure the performance of the service but also to enable it to continue the development of air transportation." The Court recognized that

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[3] After considering and excluding the $447,000 profit on the sale of the intangibles, the Board determined the "break-even need" of the carrier, i. e., the amount of money necessary to equalize income and outgo, to be $2,537,898 (R. 229, 279, 337). Return on investment at 7% was determined to be $1,375,168 (R. 229, 247, 251, 279, 337). The amount necessary to satisfy actual tax liability on items recognized for mail pay purposes, $4,295, also was provided (R. 337). Thus total mail pay for the period was allowed in the amount of $3,917,361 (R. 339). The carrier had received temporary mail pay of $4,252,000, and a refund was due of $334,639 (R. 337).

The exclusion of the $447,000 profit from the intangibles resulted in an actual return on total investment for the period involved of 9.28%. If the $652,000 profit from the sale of the tangibles also is to be excluded, as Western contends, the carrier's return will be 12.57%.

"[a]llowances designed as developmental incentives for the utility whose rates are being determined are quite common in public utility rate-making" (R. 350). These developmental allowances permitted under traditional rate-making principles and by the Civil Aeronautics Act, said the Court, are restricted "to the need of each individual carrier to maintain and continue a development program of its own" (R. 349, 350). It held that the Board's determination not to offset the profit from the sale of the intangibles was for the purpose of encouraging "other carriers (not Western) to follow a given course of action" (R. 348, 349). It concluded that the statute, and a prior decision by this Court holding that the mail rate provisions describe a traditional rate-making authority,[4] leave "no room for bonus subsidies not connected with the particular carrier's own need" (R. 350). Accordingly, it ordered a remand to the Board for the fixing of a new rate by deducting the profit from the sale of the intangible value of the route (R. 352).[5]

SPECIFICATION OF ERRORS IN NO. 224

The Court of Appeals erred:

(1) In holding that the Board's action in permitting Western to retain the portion of the profit

[4] *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board,* 336 U. S. 601.

[5] Judge Bazelon added a concurring opinion (R. 352) in which he expressed the view that rate-making principles are unsuited for application to subsidy mail rates, and that the statute should be amended to differentiate between compensation for the carrying of mail and payments to subsidize the development of air transportation.

from the route sale which the Board previously had approved as a necessary incentive to the sale had no relation to Western's action in transferring the route or to Western's own developmental program.

(2) In holding that mail pay allowances to a given air carrier for the purpose of providing industry developmental incentive have no relation to that carrier's own developmental program.

(3) In holding that Section 406 of the Civil Aeronautics Act mandatorily requires the Board to reduce mail rates otherwise "fair and reasonable" by deducting profits derived from route sales.

(4) In construing Section 406 of the Civil Aeronautics Act in such manner as to restrict developmental mail pay allowances to situations in which those allowances are required for the purpose of aiding and encouraging operations and activities which are to be continued by the carrier.

(5) In failing to recognize and to hold that, in fixing "fair and reasonable" mail rates, the Board has sound discretionary authority to refuse in appropriate cases, for reasons of regulatory policy, to reduce mail pay allowances by certain categories of "other revenue."

(6) In reversing the order of the Board.

SUMMARY OF ARGUMENT

I

The rate fixed for Western was a subsidy rate. The revenues derived from the route sale and the operation of restaurants and concessions at airports were considered by the Board as available

only to reduce the carrier's subsidy allowance, and not for the purpose of requiring it to transport the mail at less than a compensatory rate. These revenues grew out of and were inextricably related to Western's air carrier activities. They fell within the consistent view of the Board that the "other revenue" which may be used to reduce subsidy includes both direct transportation revenues and revenues derived from activities incidental or related to the air carrier operations for which the subsidy rate is being fixed. Congress must have intended that the Board take into account a carrier's overall position attributable to its privileged air carrier status in determining the amount of subsidy to be provided, else it would not have employed the sweeping phrase "all other revenue" in Section 406(b).

The fact that all of the other revenues here involved were not susceptible of prediction at the beginning of the rate period is inapposite. The rate was for a past period, and all items of income and expense were known. The Board was required to fix the rate in the light of available data rather than on the basis of assumed forecast. *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio,* 294 U. S. 79.

II

Although the profit from the sale of the intangible value of Route 68 was available for the reduction of the mail pay allowance, the Board was not mandatorily required to use it for that purpose, and the Court of Appeals erred in so holding.

The Court of Appeals recognized that the Board is authorized by the statute to grant need mail pay for developmental incentive purposes, and it did not deny statutory authority to the Board to induce route transfers by permitting need carriers to retain the profits from route sales. It apparently reversed the Board's order solely because it believed that permitting Western to retain the profit from the sale of the intangibles constituted an incentive or inducement to other carriers, and had no relation to Western's action in transferring Route 68 or to Western's own developmental program. Yet the Court recognized that the Board had approved the purchase price because the profit on the intangibles was an incentive to the sale, and certainly this approval constituted a form of inducement on the part of the Board. Further, Western sold Route 68 in part because it desired to concentrate on regional operations rather than continuing its dual role as a regional carrier and as one participating in transcontinental operations. The Court erred in failing to recognize that permitting Western to retain the very profit which had motivated the transfer bore a direct relation to Western's action in selling the route and to that carrier's own developmental program.

If the Court of Appeals believed that developmental incentive allowances are permitted only for the purpose of aiding and encouraging operations which are to be continued by a carrier, we believe the decision below to be equally erroneous. In this aspect of the case, we rely upon the showing made in the Board's brief in Case No. 222

(pp. 39 to 45) that mail pay is a developmental tool to be used for the building of a sound and adequate air transportation system, and that the Board has discretionary authority to exclude particular categories of "other revenue" from the computation of mail pay allowances where that action is necessary to the development of air transportation.

ARGUMENT

Introduction

If Western is correct in its view that the only air carrier revenue which may be used to reduce mail pay allowances is transportation revenue, the question of whether the Court of Appeals erred in holding that the mail pay allowance was required to be reduced by the profit from the sale of the intangible value of Route 68 will not be reached. Accordingly, we first direct our argument to Western's contention.

1. The profits from the sale of Route 68 and the accompanying air carrier properties, and from the operation of the restaurants and other concessions, was "other revenue" to be considered by the Board in determining Western's mail pay allowance

Section 406(b) of the Act (*infra*, p. 31) directs the Board in fixing mail rates to "take into consideration * * * all other revenue of the air carrier." The question of what other revenues should be taken into account arises only in the case of "need" or subsidy rates.[6] In fixing need rates,

[6] The Board has developed two types of mail rates under Section 406. One is the need or subsidy rate which is fixed at a level greater than that necessary to provide a fair return

the Board does not take into account all of the corporate income of a carrier. Rather, it ordinarily will reduce the rate by the amount of all transportation revenues received or anticipated from the scheduled operations, and by those other revenues which are derived "from the operation of the air carrier under its certificate of public convenience and necessity" or from an activity "related to the air carrier functions" (R. 193).[7]

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on investment allocated to the mail service. The other is the service or compensatory rate, designed to provide just compensation for the service of transporting the mail. Although the statute does not distinguish between need and service rates, the Board has not considered that it should require a carrier to transport mail at less than a compensatory rate, irrespective of the extent of its "other revenue".

[7] This interpretation of "all other revenue" by the Board accords with the well-recognized rule that "gross revenue" for public utility rate-making purposes "consists of the total income from the public utility business itself and all operations incidental to the main enterprise, but does not include income from an independent source or from property not used in the public service." 43 Am. Jur. "Public Utilities and Services", § 156. It also is consistent with a prior holding by this Court that the phrase "net earnings of the road" contained in an Act granting governmental assistance to a railroad embraces "all the earnings and income derived by the company from the railroad proper, and all the appendages and appurtenances thereof * * * and all its property and apparatus legitimately connected with its railroad", but not income unrelated to the railroad business. *Union Pacific R. R. Co.* v. *United States*, 99 U. S. 402, 419.

Familiar examples of incidental revenues which are considered for ordinary rate-making purposes are by-products of natural gas (*United Fuel Gas Co.* v. *R. R. Commission of Kentucky*, 278 U. S. 300; *Cities Service Gas Co.* v. *Federal Power Commission*, 155 F. 2d 694, 703 (C.A. 10); *certiorari denied* 329 U. S. 773); rentals received from concessionaires at railroad stations and other rentals from property included in the rate base (*In Re Arkansas Rate Cases*, 187 Fed. 290, 313 (E.D. Ark.), reversed on other grounds 230 U. S. 553; *Fleming* v. *Illinois Commerce Commission*, 388 Ill. 138, 57 N. E. 2d 384); and directory and transit advertising (*Baldwin* v.

The rate being fixed for Western was a need rate.[8] The operation of Route 68 was an integral part of Western's air carrier business, accounting for 29% of total volume of operations (R. 69), and the sale of the route and operating properties incident thereto was possible only because of Western's operations and status as an air carrier. The operation of the restaurants and concessions also was incidental to the air carrier operations. These activities were carried on at airports for the convenience of airline passengers and employees, were financed out of air carrier working capital, utilized other assets and facilities included in Western's rate base, and were supervised by air carrier employees (R. 193-195, 266). The profits from these transactions thus fell within the Board's interpretation of "all other revenue," and accordingly were regarded by the Board as available to reduce the mail pay allowance.[9] The Court of Appeals

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Chesapeake & Potomac Tel. Co., P.U.R. 1928 E, 529 (Md. P.S.C.); *Re St. Louis-San Francisco Ry. Co.*, P.U.R. 1926 B, 669 (Mo. P.S.C.).

[8] The service rate for Western's system in 1943 was 60 cents per mail ton-mile (*Western Air Lines, Mail Rates*, 4 C.A.B. 441), and its present service rate is 53 cents per mail ton-mile (C.A.B. Order E-6553, dated June 27, 1952). We are aware of no circumstances which would afford any basis for assuming that a proper compensatory rate for the carrier during the period here involved would have exceeded 60 cents per mail ton-mile. The allowance fixed by the Board yielded Western a return of 109 cents per ton-mile for mail actually transported. If the $447,000 profit on intangibles excluded by the Board should be used to still further reduce the mail pay allowance, the yield would be 96 cents per ton-mile.

[9] The greater portion of the profit from the route transfer was realized from the sale of the air carrier properties ($652,000). Profits from the sale of operating property always have been considered as "other revenue" by the Board

affirmed the determination by the Board that the profits were to be taken into consideration in determining the mail pay allowance, but not the construction placed upon "all other revenue" by the Board. The Court stated (R. 351)

> When the statute says "all other revenue" it must mean to include revenue derived from activities incidental to the operation of the airline. Whether it would also include revenue from activities unconnected with airplane operation is a question not before us and upon which we intimate no opinion.

Western's contention that the Court of Appeals erred in this construction, and that "all other revenue" means only direct transportation revenue derived from commercial rates, is wholly unpersuasive. True enough, the term "revenue" is used only twice in the Act, once in Section 406(b) and once in Section 1002(e) (49 U.S.C. 642(e)),

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in fixing need rates for past periods (R. 192, 193, 264). In the only prior Board case dealing with profit from a route transfer, the profit was considered in determining the carrier's mail pay allowance. *Inland Air Lines, Mail Rates*, 1 C.A.A. 155, 162-163 (1939).

Under the Board's Uniform System of Accounts, air carriers are required to report "net revenue from incidental services" relating to items such as charter and special flights; hotel, restaurant and food services; rentals from operating properties; sales of parts, supplies and services; and the like. These incidental revenues also are customarily considered to be "other revenue" within the meaning of the Act (See R. 192. 193 and the cases there cited).

Where income is derived from an activity which is "entirely separate and apart" from the air carrier activities, it is not taken into account (R. 193). Crop dusting, private pilot training, and profits from the sale of stock of a foreign subsidiary have been regarded as falling into this latter category (See R. 193).

wherein the Board is directed to take into consideration in fixing commercial rates the "need of each air carrier for revenue." Assuming that the word "revenue" should be given the same meaning in both sections, as Western contends, it does not follow that the "revenue" mentioned in Section 1002 is restricted to tariff revenue. There is no reason why incidental revenues of a recurring nature may not be taken into account in fixing commercial rates, at least to the extent of determining whether the carrier is obtaining an overall fair return on investment. This is normal rate-making practice which must have been known and contemplated by the Congress. (See cases cited in note 7, *supra*, p. 14).

Further, if the revenue which may be considered in fixing commercial rates is only tariff revenue, it still does not follow that the word must be given the same meaning in Section 406. The meaning of the same term employed in different sections of a statute may vary according to the purposes of the sections wherein the term appears. *United States v. Champlin Refining Co.*, 341 U.S. 290.[10] Section 406 permits subsidy mail pay, and Western was a subsidized carrier. The purpose of subsidy mail pay is not to afford a private benefit to air carriers, but to maintain and develop a sound and adequate air transportation system (Sections 2, 406(b), *infra*, pp. 29, 31). Certainly the Congress

[10] Revenue is not defined by the Act. However, the definitions of such terms as are defined are proceeded by the admonition that such definitions are to be applicable only "unless the context otherwise requires." Sec. 1 (49 U.S.C. 401).

must have intended to permit the Board to take into account a carrier's overall position attributable to its privileged status as an air carrier in determining the amount of subsidy to be provided. It could not have meant less by the use of a term as sweeping and inclusive as "all other revenue." [11]

Neither do the facts that rate-making ordinarily is prospective in nature, and that all of the revenues here involved were not capable of prediction at the beginning of the rate period, constitute any barrier to their consideration. All items of income and expense were known. Rates for a past period are not to be fixed upon the basis of forecast, but

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[11] The legislative history of the Act sheds little light on the interpretation to be given to the term "all other revenue." Western placed great reliance before the Board upon the fact that the Interstate Commerce Commission had considered the phrase "revenue and profits from all other sources" as used in Section 6(e) of the Air Mail Act of 1934 (48 Stat. 936) to be restricted to only transportation revenues. However, Section 6(b) of that Act (48 Stat. 935) directed the Commission to review each year the rates of compensation there provided (not to exceed a stated amount) for the purposes of determining whether an "unreasonable profit" was being derived. The section provided that "in determining what may constitute an unreasonable profit, the said Commission shall take into consideration all forms of gross income *derived from the operation of airplanes over the route affected*" (emphasis added). Section 6(e) directed the Commission in determining "fair and reasonable" compensation to take into account "revenue and profits from all sources." The Commission, conceiving its function under the Act to be that of "fixing rates for the routes irrespective of the contractor operating them at any particuler time," preferred to follow the more restrictive standard set forth in Section 6(b) which obviously conflicted with the provisions of 6(e). *Airmail Compensation*, 206 I.C.C. 675, 695-7, 720 (1935).

Further, as the Board pointed out (R. 260-261), the Air Mail Act of 1934 was not a subsidy statute, but rather was directed only to providing compensation for the carriage of the mail.

in the light of available operating data. *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio,* 294 U. S. 79, 82. Moreover, income derived from related air carrier activities such as the operation of air ports and terminals at airports, charter and special services, rentals, and the like, can be predicted for the future with the same degree of certainty that direct transportation revenues may be predicted. Western itself predicted the amount of revenue which would be derived from these sources in submitting estimates as to its need for mail pay after January 1, 1949 (R. 93, 94). Profits from route sales and air carrier equipment cannot of course be anticipated in fixing future rates. However, route sales, and sales of air carrier properties to another carrier, can be consummated only after Board approval (Sections 401(i) and 408, 49 U.S.C. 481(i), 488). If a carrier is conducting operations under a final need rate, the Board, we believe, properly can institute new rate proceedings prior to permitting the consummation of a particular sale so that a part of the profits therefrom may be used to reduce subsidy mail pay from the date of the new rate proceeding.

Nor does the offsetting of income derived from incidental air carrier activities impose any obligation on the government to bear the risk of failure of "extra-curricular" business ventures by carriers, or result in any unfairness to the carrier, as Western contended below. Losses incurred in the operation of facilities reasonably necessary to air carrier operation, such as the operation of

airport terminals and the like, are underwritten to the extent that past or anticipated losses meet the test of "honest, economical and efficient management" (Section 406(b) *infra,* p. 31). Indeed, this test requires positive effort on the part of carriers to develop both transportation and related non-transportation revenues so that costs will be decreased (R. 195), and the taking of these revenues into account is the normal and reasonable practice of any rate-fixing agency. Further, even if a particular related air carrier activity is of such nature that losses will not be underwritten, such as the operation of slot machines, there should be no objection to the use of the profits to reduce subsidy pay unless some public purpose requires a contrary result. There is no reason for granting subsidy in a case where a carrier's revenues derived solely from its status as an air carrier are sufficient for the realization of statutory objectives.

II. The Board did not exceed its statutory authority in declining to reduce Western's mail pay allowance by the amount of profit realized from the sale of the intangible value of Route 68

Although we believe the Court of Appeals correctly held that the profit from both the sale of the air carrier properties and the intangible value of Route 68 constituted "other revenue" available for the reduction of mail pay, we think the Court erred when it held that the mail pay allowance mandatorily was required to be reduced by the profit from the sale of the intangible value of the route. Our views as to the purpose of the mail rate

provisions of the Act and the discretionary authority conferred upon the Board in administering Section 406(b) are fully set forth in the Board's brief, to which the Court's attention is respectfully invited, in *Civil Aeronautics Board* v. *Summerfield, et al.*, No. 222, consolidated with these cases for hearing. What has been said there will not be repeated here. We show below that the Board's action in permitting Western to retain the profit from the route sale bore a reasonable relation both to Western's own action in transferring Route 68 and to the statutory objective of developing a sound and adequate air transportation system (See Section 2, *infra*, p. 29).

The Civil Aeronautics Act was adopted in 1938 when air carriers were utilizing DC-3 or smaller aircraft. The "grandfather certificates" issued under the Act (Section 401(e), 49 U.S.C. 481(e)), and the certificates issued for some time after 1938, necessarily resulted in a route pattern designed for these small aircraft. The advent of larger, faster, and longer-range aircraft after the cessation of hostilities in World War II, together with postwar economic and transportation developments, have called for many changes in the route pattern, a fact recognized by the industry, the Board, and other agencies of government.[12] Most of the domestic trunkline carriers hold permanent certificates for their routes. There are both in-

[12] See *e.g.*, "Survival in the Air Age", A Report By The President's Air Policy Commission, 1948, p. 110; "National Aviation Policy"; Report of the Congressional Aviation Policy Board, 80th Cong., 2nd Sess., p. 26.

dividual routes and systems which would fit more logically into other systems, thereby creating new individual operating patterns which give promise of permanent economic self-sufficiency.

The Board lacks statutory authority to compel route transfers and mergers.[13] It has not believed that it should withhold mail pay from a carrier operating a route required by the public convenience and necessity for the purpose of forcing a transfer or merger. See *United-Western, Acquisition of Air Carrier Property,* 8 C.A.B. 298, 323 (1947). Accordingly, it has employed various methods of persuasion and inducement to encourage voluntary adjustments in the route pattern. These methods have included the suggesting of various mergers and consolidations deemed appropriate by the Board, and the permitting of route transfers at a profit to the selling carrier.

The determination to permit route transfers at a profit represented a major policy determination by the Board and was announced in connection with the transfer of Route 68. *United-Western, Acquisition of Air Carrier Property,* 8 C.A.B. 298 (1947). Western was a regional carrier operating in the Western section of the United States, and the Los Angeles-Denver route was of primary im-

[13] Section 401(h) of the Act (49 U.S.C. 481 (h)), authorizes the Board to "alter, amend, modify, or suspend" certificates. The Board as presently advised considers that it is authorized by this section to suspend or withdraw one carrier's certificate authority and to substitute service by another carrier only where such action will not result in a transformation of the essential character of the first carrier's operation. *Western Air Lines* v. *Civil Aeronautics Board,* 196 F. 2d 933 (C.A. 9), *cert. den.* 344 U. S. 875; *United Air Lines* v. *Civil Aeronautics Board,* 198 F. 2d 100 (C.A. 7).

portance as a link to transcontinental operations. Western desired to concentrate on developing regional operations, and the operation of Route 68 would not have been economically feasible on the part of a regional carrier from a long-range standpoint. Moreover, Western was in need of cash to meet outstanding obligations. See 8 C.A.B. 298, 302, 303, 325. The route fitted more logically into United's system. The Board, with one member dissenting, was of the view that allowing Western to make a commercial profit on the sale would be in the public interest since this and other route transfers otherwise would, except in rare instances, be unlikely. 8 C.A.B. 298, 323, 341. Accordingly, it determined to permit route transfers at a profit in appropriate cases irrespective of whether the transferring carrier was a subsidy or service rate carrier.

It first concluded in this case that other incentives would provide a sufficient spur for such transfers in the case of subsidized carriers (R. 198, 199). One member dissented, characterizing the Board's action as a "penny-wise and pound-foolish" decision (R. 231). On reconsideration, the Board reverted to its original views as expressed at the time of the transfer. It pointed to the fact that the profit to Western on the sale of the earning power or intangible value of Route 68 was the "factor which played the decisive part in the route transfer" (R. 264). It stated (R. 263):

> It was the Board's serious concern in the *Acquisition* case that unless Western were allowed a "commercial profit" from the then

> proposed transaction, the Board would be thwarting the improvement of the air pattern through voluntary action by the carriers. Improvement of the national air pattern has been for some time, and still is, a primary objective of the Board. It should be apparent, therefore, that we must consider the possible effect of our action in this proceeding on what the Board was trying to accomplish in the *Acquisition* case. If we now decided to deny Western the right to keep any part of the profit permitted in that case, we would, in effect, override the considerations which prompted the opinion and destroy the possibility of the incentive which the Board found so important. In order to avoid the danger of confining the present air pattern to a rigid mold, and to continue to encourage voluntary action by the carriers, we believe that the incentive of profit which may be derived from the sale of a route so clearly approved in the *Acquisition* case should be preserved here.

Accordingly, the Board determined not to reduce Western's mail pay by the profit from the sale of the intangible value of the route since it concluded that a denial to Western of some commercial profit on the sale would constitute a thwarting of improvement in the air transportation pattern through voluntary action by the carriers, and because the Board was seeking in this manner to spur the development of a self-sufficient air transportation industry (R. 263-265).

The Court of Appeals reversed the Board's order

solely on the ground that the Board had exceeded its statutory authority, and not because the Court believed the action to be unreasonable or unrelated to permissible statutory objectives. Indeed, the Court of Appeals recognized the "force of the Board's description of the desirability of encouraging carriers to transfer routes and other property" (R. 349), thereby rejecting, we believe, the Postmaster General's contentions below that the Board's action was unreasonable.[14] The Court of Appeals also rejected, in this case, the Postmaster General's contention that need mail pay may be awarded only in that minimum amount necessary to sustain an existing or projected operation and to provide a stated rate of fair return on investment. The Court expressly recognized (R. 344) that Section 406 "says that the carrier should receive the amount needed not only to insure the performance of the service but also to enable it to continue the development of air transportation," and that "allowances designed as developmental in-

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[14] The Postmaster General had urged below that the Board's action, if within statutory authority, was unnecessary and unreasonable in that other sufficient means existed for effectuating desired changes in the route structure, and that no reasonable basis existed for a belief that other voluntary transfers would result from the Board's action in this case. These arguments, which go to the wisdom of the Board's action, centered around the statements in the tentative opinion wherein the Board had first determined to offset the entire profit from the route transfer (R. 195-200). The Board's ultimate conclusion was within the realm of rational inference, and related to a matter within its competence. The fact that the ultimate conclusion reached after fuller consideration was different from the one first stated is of no legal significance. See *e.g.*, *Shein* v. *United States*, 102 F. Supp. 320 (D. N.J.), affirmed per curiam 343 U.S. 944.

centives" are permissible (R. 350). It did not in terms deny the statutory authority of the Board to induce action such as a route transfer through permitting a carrier to retain a portion of the profit from the transfer. Rather, it appears to have upset the Board's order solely on the ground that permitting Western to retain the profit from the sale of the intangibles was for the purpose of encouraging "other carriers (not Western) to follow a given course of action" (R. 348, 349), and because the action had no relation to Western's own "development program" (R. 350).

We think it obvious that the Board's action in permitting Western to retain the sum of money here involved had a sufficient relation to Western's own situation to bring it within the rule enunciated by the Court. The sale was a step in Western's "development program" for concentrating on regional operations (*supra*, p. 23). Western had responded to the profit incentive, and the Court found that the Board approved the purchase price of Route 68 "because the profit on the transaction would provide the necessary incentive to Western to make a sale" (R. 343). Presumably, under the Court's reasoning, the Board could announce that, for the purpose of encouraging route transfers, the profit derived from the sale of the intangible value of the route would not be used to reduce mail pay, and then adhere to that position with respect to any "need" carrier which sold a route in reliance upon the representation. However, routes may be transferred only by leave of the Board and at a

price which the Board approves as being in the public interest (Section 401(i), 49 U.S.C. 481(i)). The Board of course did not promise Western in the *Acquisition* case that it could retain the profit from the sale of the intangibles. Nonetheless, when the Board approves a certificate sale at a profit for the purpose of encouraging route transfers, as in the case of Route 68 (8 C.A.B. at p. 323), we think the carrier could reasonably expect to be permitted to retain the profit attributable to the sale of the certificate, and that the approval of the purchase price represents an inducement for the transfer on the part of the Board. Further, administrative policy may be formulated on a case-to-case basis rather than by general rule. We believe that a policy determination not to reduce need mail pay by particular categories of "other revenue" has the same relation to the developmental program of the carrier whose action evoked the policy that it has to those of the carriers who come after.

If we have misconceived the basis for the reversal of the Board's order, and if the Court of Appeals in reality was of the view that developmental allowances are permitted only for the purpose of aiding and encouraging activities which are to be continued by the carrier, we believe the decision below to be equally erroneous. In this aspect of the case, we rely upon the showing made in the Board's brief in Case No. 222 (pp. 30 to 45) that mail pay is a developmental tool to be used for the building of a sound and adequate air transportation system,

and that the Board has discretionary authority to exclude particular categories of "other revenue" from the computation of mail pay allowances where that action is necessary to the development of air transportation. We also note here, as there, that, after full consideration, the Board found the rate fixed for Western to be "fair and reasonable" (R. 338). The statute required no more.

CONCLUSION

The judgment below should be reversed only insofar as it set aside the order of the Board.

Respectfully submitted,

EMORY T. NUNNELEY, JR.,
General Counsel,
Civil Aeronautics Board,
Washington 25, D. C.

JOHN H. WANNER,
Associate General Counsel,
JAMES L. HIGHSAW, JR.,
Chief, Litigation and Research Division,
MORRIS CHERTKOV,
O. D. OZMENT,
Attorneys,
Civil Aeronautics Board,
Washington 25, D. C.

APPENDIX

The pertinent provisions of the Civil Aeronautics Act of 1938, as amended,[15] are as follows:

DECLARATION OF POLICY

SEC. 2. In the exercise and performance of its powers and duties under this Act, the [Board] shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-trans-

[15] Act of June 23, 1938, c. 601, 52 Stat. 973; Reorg. Plan No. IV, Sec. 7, effective June 30, 1940, 5 F. R. 2421, 54 Stat. 1235, 49 U. S. C. 401, et seq.

portation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety, and

(f) The encouragement and development of civil aeronautics.

Rates for Transportation of Mail

Authority to fix rates

Sec. 406. (a) The [Board] is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other means than aircraft whenever such transportation is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same; and

the rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft.

RATE-MAKING ELEMENTS

(b) In fixing and determining fair and reasonable rates of compensation under this section, the [Board], considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case the [Board] shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

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